Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-816, 84-824, and 84-856

In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case raises questions as to the validity of certain aspects of the FCC's end-user access charge plan, which provides for the recovery of a part of the cost of local telephone company equipment. A large portion of that equipment is used for both intrastate and interstate service; part of the cost of that equipment is "non-traffic-sensitive"—*i.e.*, it does not vary with the extent of use. The Commission has adopted a plan pursuant to which most of the portion of these non-traffic-sensitive costs that is allocated to the "interstate jurisdiction" ultimately will be recovered through a flat access fee payable by all telephone subscribers, without regard to whether they make interstate calls.

The questions presented are:

(1) Whether the Commission invaded the authority to set rates for intrastate service that is reserved to the states by the Communications Act.

(2) Whether the Commission's end-user access charge plan prescribes rates which are unlawfully discriminatory.

(3) Whether the Commission's end-user access charge plan will have an adverse effect on universal service that is impermissible under the Communications Act.*

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*All of the petitions to which we respond herein raise some aspect of Question 1, which also was presented by the petition in No. 84-95, *National Association of Regulatory Utility Commissioners* v. *FCC*. No. 84-95 also seeks review of the judgment of the court of appeals challenged here. In this brief we address only those aspects of Question 1 not addressed in our brief in opposition in No. 84-95. Petitioner Florida alone raises Questions 2 and 3.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (84-95 Pet. App. 1a-110a[1]) is reported at 737 F.2d 1095. The orders of the FCC are reported at 93 F.C.C.2d 241 (Report and Order), 48 Fed. Reg. 42984 (1983) (Order on Reconsideration), and 49 Fed. Reg. 7810 (1984) (Order on Further Reconsideration).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. A petition for rehearing was denied on August 23, 1984. The petitions for a writ of certiorari were filed on November 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case, like *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 84-95, and *National Association of State Utility Consumer Advocates* v. *FCC*, No. 84-504, arises from rulemaking proceedings undertaken by the Federal Communications Commission (FCC) to determine, inter alia, how local telephone companies should recover the "interstate" portion of the fixed costs of those local exchange facilities that may be used for both interstate and intrastate telephone service.[2] In the series of orders generally known collectively as the "*Access Decision*," the

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[1] Hereinafter "Pet. App." denotes the appendix to the petition for a writ of certiorari in the related case, No. 84-95. See page I note *, *supra*.

[2] The pertinent technical and regulatory background is described in the government's brief in opposition in No. 84-95. The procedures employed by the Commission in arriving at its *Access Decision* are described in our brief in opposition in No. 84-504 (at 2-3).

Commission endorsed a new system under which most of the interstate share of the costs of non-traffic-sensitive, jointly-used local exchange facilities ultimately will be recovered directly from telephone subscribers through fixed monthly charges.[3]

Numerous petitions for review of the Commission's *Access Decision*, raising a wide variety of claims, were filed in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed the agency's action in all but minor respects. Five petitions for certiorari have by now been filed in this Court. Those petitions challenge only that portion of the *Access Decision* which required the use of fixed end-user charges to recover the portion of the non-traffic-sensitive costs of local exchange equipment assigned, through the separations process, to the interstate jurisdiction.

ARGUMENT

1. Each of the most recent round of petitions urges that the access charge devised by the Commission to enable local exchange carriers to recover the interstate share of the non-traffic-sensitive costs of local exchange equipment used for both local and long-distance calls invades authority reserved to the states under the Com-

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[3] As we have explained in our response in No. 84-504 (at 2, 6-7), in the *Access Decision* the Commission did not actually approve tariffs or fix rates. Rather, it devised a framework for the recovery of the interstate share of the fixed cost of local exchange facilities. Pursuant to the *Access Decision*, local telephone companies will eventually be required to file tariffs specifying the rates they will charge for access to interstate service. At present, only tariffs setting rates for multi-line business customers need be filed; but beginning in June 1985, the FCC will require the filing of tariffs specifying end-user charges for other customers. Developments in this area subsequent to the conclusion of the proceedings below in this case are described at page 8 note 11, *infra*.

munications Act or by this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[4] Similar contentions were advanced in Nos. 84-95 and 84-504; these are addressed in our response in No. 84-95 (at 6-11). This response is confined to matters not addressed in our previous response. The issue framed by petitioners in No. 84-816 [hereinafter "Wisconsin"] and petitioner in No. 84-856 [hereinafter "New York"] is a permutation of the issue previously addressed. These petitioners contend that, in the aftermath of the divestiture decree separating the former Bell Operating Companies from the American Telephone and Telegraph Company, the operating companies have assumed the status of "connecting carriers" for purposes of the Communications Act, 47 U.S.C. 151 *et seq*. Under Section 2(b) of the Communications Act, 47 U.S.C. 152(b), the authority of the FCC is in some respects more limited with respect to connecting carriers than with respect to interstate carriers. Because the access charge system entails payment directly to local exchange companies of each subscriber's assessment for the interstate share of fixed local exchange costs, these petitioners contend that implementation of the access charge regime is beyond the Commission's authority.

This argument was correctly rejected by the court of appeals (Pet. App. 43a-44a n.23). Even if we assume arguendo that the former Bell Operating companies are now to be regarded as "connecting carriers" for purposes of the Communications Act,[5] it does not follow

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[4] See 84-816 Pet. 11-22; 84-824 Pet. 7-17; 84-856 Pet. 5-14.

[5] The FCC was not asked in the access charge proceeding to determine whether the divested Bell operating companies are connecting carriers within the meaning of the Communications Act. That question thus is not properly before this Court, and should not be considered in the first instance in a reviewing court. The question of the federal regulatory status of those divested companies is an important one that the FCC should con-

that the Commission was without authority to institute the access charge regime. To be sure, Section 2(b)(2) of the Communications Act on its face withholds from the Commission certain powers over connecting carriers that are not owned or controlled by interstate carriers. But the proviso to Section 2(b) makes clear that "sections 201 to 205 of [title 47] shall, except as otherwise provided therein, apply to carriers described" therein, including connecting carriers. Thus, the very statute on which these petitioners rely explicitly makes connecting carriers subject to the FCC's authority under Sections 201 through 205, 47 U.S.C. 201-205. Sections 201 through 205, the FCC's principal ratemaking statutes, provide ample authority for the Commission's imposition of end-user access charges to be paid to connecting carriers. As the court of appeals observed (Pet. App. 43a-44a n.23), while Section 203(a) of the Communications Act, 47 U.S.C. 203(a), does not *require* connecting carriers to file tariffs with the Commission,[6] under Sections 201, 202 and 205 their rates still must be just and reasonable.[7] "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205" (Pet. App.

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sider in the first instance. Its resolution turns in large part on factual determinations as to just what activities the divested Bell companies may engage in. The record in the access charge proceeding is not adequate to resolve the connecting carrier status question that California and New York seek to raise here.

[6] Section 203(a) requires carriers, "except connecting carriers," to file tariffs with the FCC. Connecting carriers traditionally have concurred in the tariffs filed by AT&T for interstate service, although they also have filed tariffs and tariff exceptions of their own where appropriate.

[7] Sections 201(b) and 202(a) require that rates be just and reasonable and not unreasonably discriminatory. Section 205(a) allows the Commission to enforce the provisions of Sections 201 and 202 and to prescribe lawful rates in the event the tariffs filed are unlawful.

43a-44a n.23). Moreover, in order to ensure that the rates charged by connecting carriers are not in violation of Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, the FCC has *discretion* to use its powers under Section 4(i), 47 U.S.C. 154(i), to require connecting carriers to file tariffs. See *Lincoln Telephone & Telegraph Co.* v. *FCC*, 659 F.2d 1092, 1108-1109 (D.C. Cir. 1981).[8] In sum, the Commission has the authority to impose flat access charges on end-users and to require carriers to implement those charges by filing tariffs with the federal agency. This is true regardless of whether the former Bell operating companies are deemed connecting carriers.[9]

2. Observing that nationally uniform access charges will impose a larger percentage incremental cost increase upon telephone subscribers in areas where local exchange service is comparatively inexpensive, petitioner Florida contends (84-824 Pet. 17-21) that the *Access Decision* fosters unlawful discrimination in rates in violation of 47 U.S.C. 202. The factual premise advanced by the state does not establish the legal conclusion tendered.

As Florida observes (84-824 Pet. 8-9), in determining local rates, state regulatory utility commissioners take

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[8] Section 4(i), 47 U.S.C. 154(i), provides, in relevant part, that the FCC may "issue such orders, not inconsistent with [the Act] as may be necessary in the execution of its functions."

[9] While the divested Bell operating companies collectively serve a majority of the nation's telephone subscribers, it is useful to bear in mind that the FCC's access decision also applies to some 1500 independent local companies that were not affiliated with AT&T at the time the decision was made. Thus, even if the divestiture had not occurred, the FCC's order would have been applicable to many companies that claimed to be connecting carriers. The court of appeals addressed the general question of the FCC's authority over connecting carriers, without special focus on the divested Bell companies, and found that authority to be adequate (Pet. App. 43a-44a n.23).

into account many factors, including the amount of the investment in equipment, operation and maintenance costs, and expected rate of return for investors. State regulators are also free to, and do, follow diverse policy orientations in ratemaking; the inevitable result is that local rate structures are not uniform among jurisdictions. Given this latitude for variation, it is also inevitable that a uniform flat access charge will not always constitute the same proportion of local exchange rates. But the mere existence of variation in these proportions from area to area does not establish that uniform access charges are discriminatory or that they are not cost based. Rather, the question whether access charges should be adjusted to reflect local costs is a policy decision committed to the Commission.

Averaging of charges on a nationwide basis is consistent with past practice in the telephone industry. For many years, long-distance charges have been averaged on a nationwide basis.[10] Similarly, most local telephone companies charge a flat fee for telephone service regardless of the distance between customer premises and the telephone company's central office, thereby effecting an averaging of rates. Under the argument advanced by Florida, such practices would be illegal.

Florida's contention with respect to averaging of rates is, in any event, premature. As we explained in No. 84-504 (at 2, 6-7), the *Access Decision* did not prescribe rates; rather, it prescribed a framework for the recovery of a large part of the interstate share of the

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[10] See *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 856-869, on reconsideration, 38 F.C.C.2d 665, 692-697 (1972) (requiring carriers to bring Alaska and Hawaii into the uniform mileage rate pattern that obtains in the 48 contiguous states, "with all that such approach implies in terms of nationwide cost averaging and equalizations for interstate ratemaking proposes"). See also *Integration of Rates & Services*, 87 F.C.C.2d 20 (1981).

cost of local exchange facilities. Local telephone companies thus far have been at liberty to charge differing rates, so long as they did not exceed the cap applicable to a particular class of service. See 84-504 Gov't Br. in Opp. 7 n.6. If petitioners or other interested parties believe that rates set forth in tariffs now in effect are unjust, unreasonable or unreasonably discriminatory under Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, they may challenge those rates directly in an appropriate proceeding. If a carrier's tariff reflects rates that are determined to be illegal, the Commission may prescribe reasonable rates and award damages. See 47 U.S.C. 205, 206-209.[11]

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[11] In separate proceedings subsequent to those sought to be reviewed here, the Commission has now imposed more specific requirements with respect to the end-user charges. Initially, a joint federal-state board was commissioned pursuant to 47 U.S.C. 410, to prepare recommendations on access charge amounts, for a transitional plan for implementation of those charges, and for mechanisms to ease their impact on low-income customers and in high-cost areas. See *Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 18318 (1984). The joint board proposed specific implementation measures and measures to ease the impact of implementation on those users and those companies that were particularly vulnerable. *Recommended Decision and Order*, 49 Fed. Reg. 48325 (1984). At a public meeting on December 19, 1984, the FCC voted to adopt the recommendations of the joint board in all important respects. FCC News Report No. 18196 (Dec. 20, 1984).

Under the plan adopted, the end-user charge for residential and single-line business customers will be set at $1 per month beginning June 1985, and increase to $2 per month in June 1986. The plan provides mechanisms for state regulatory commissions to set standards for waiver of access charges for low income subscribers; and it asks the joint board to consider further refinements to meet the needs of high cost companies and possible creation of "lifeline" service options. The Commission's December 19 decision has yet to be formally released. When that occurs, any party aggrieved by the Commission's actions to implement the *Access Decision* may secure judicial review. 47 U.S.C.

3. Petitioner Florida contends (84-824 Pet. 23-26) that the Commission's *Access Decision* will not actually achieve the policy objectives espoused by the Commission, in particular the continued availability of universal service and prevention of "uneconomic bypass." As explained below, this contention is unfounded. In any event it plainly does not warrant further review; Florida's quarrel with the Commission's ruling rests at root upon a different view of sound policy (on a matter committed to the Commission's judgment) rather than any objective legal principle.

Florida's assertion that the *Access Decision* will undercut the objective of universal service betrays a serious misunderstanding of the causes of escalating telephone rates and the manner in which the Commission attempted to ameliorate that problem.[12] In framing its *Access Decision* the Commission determined that the practice of "bypass," fostered by the pricing structure in the telephone industry as it existed in the 1970s and early 1980s, was likely to jeopardize universal service.[13] This was because traditional long-distance toll rates were artificially high because of distortions created by the recovery of non-traffic-sensitive costs through usage-sensitive rates. The Commission determined that, because long-distance service available through bypass technologies was substantially—albeit artificially—cheaper, large communications users

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402(a); 28 U.S.C. 2341-2349. Plainly no such challenge may be made in this case.

[12] Section 151 does not mention "universal service" in terms. The Commission does not question, however, that universal service is one of the public interest goals it should seek to advance. See Pet. App. 51a-52a.

[13] "Bypass" denotes the use by communications users of alternative distribution technologies in place of the local exchange system to route their communications. Pet. App. 44a-50a.

would increasingly abandon the local exchange system unless the distortions in the existing rate structure were reduced or eliminated.[14] This would in turn force up rates for those users who chose, for economic reasons or otherwise, to remain on the local exchange system. The court of appeals concluded that the Commission had justifiably responded to the uneconomic bypass phenomenon (Pet. App. 49a):

> The FCC sufficiently established the existence of bypass as a real market force. It sufficiently established both (1) the inability of regulators, under a noncost-based pricing system, to determine accurately the economic efficiency or inefficiency of a given technology, and (2) the likelihood that market participants under such a system will exploit available bypass technology when they can reduce their costs by doing so.

Thus the access charge system was designed to discourage uneconomic bypass by eliminating distortions in the apportionment of long-distance costs.

Petitioner Florida's fears that the access charge regime will undercut universal service are particularly unwarranted because, in order to ensure that universal service is not endangered, the *Access Decision* contemplates the creation of a Universal Service Fund. Subscribers in high cost service areas will, to a limited extent, be subsidized by that Fund, which will be comprised of sums collected through usage-based charges

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[14] Contrary to Florida's assertions (84-824 Pet. 23), bypass presents a viable alternative only for the large-scale user. The initial cost of deploying bypass technology is substantial, and small users accordingly would not find bypass technologies economically viable. Thus, it is plainly incorrect to assert that the end-user charge encourages bypass. Whatever else might be said about the end-user charge, it was designed to *discourage* bypass by those who were likely to be able to take advantage of bypass opportunities. See Report and Order, 93 F.C.C.2d at 252-253, and App. F to the Report and Order (J.A. 1301 in the court of appeals record); see also Pet. App. 44a-50a.

to be imposed on long-distance carriers. See 84-95 Gov't Br. in Opp. 4 n.2.

In sum, the *Access Decision* was in large measure a reaction to well-founded concern that the old pricing structure in the telephone industry presented a real threat to universal service. While some may disagree on policy grounds with the means chosen by the Commission to preserve universal service, the Commission's choice is supported by the record. As the court of appeals observed (Pet. App. 52(a)):

> The Commission had record support for the view that a charge could be imposed without substantial negative effect on universal service.

In addition, the Commission has undertaken to monitor the results of its decision and to make appropriate changes if necessary to preserve universal service. At its December 19, 1984, public meeting (see page 8 note 11, *supra*) the Commission received a report from its staff on the effects of its recent actions (including the *Access Decision*) (Dec. 20, 1984). The Commission resolved to continue to monitor the effects of these actions on local rates and the number of subscribers.[15]

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[15] Amicus curiae Los Angeles contends (Br. 7-9) that the Commission extended access charges to Centrex-CO service without adequate support in the record for its decision. This argument was not raised by any of the petitioners and accordingly is not properly before the Court. In any event, the court of appeals correctly upheld the Commission's decision with respect to treatment of Centrex-CO service (Pet. App. 57a-64a). Briefly, through Centrex-CO service, a large institutional customer may use telephone company switches to create an internal switched network without the expense of on-premises switchboards or PBX equipment. The service requires the use of more subscriber lines than the customer would use if it provided its own switchboard. Los Angeles' argument is that application of the flat per-line charge to each Centrex-CO line may result in making this service prohibitively expensive. The court of appeals determined that the record supports the Commission's determi-

4. Petitioners Wisconsin and New York also assert that further review is warranted here because of the pendency of other cases involving the exercise of FCC jurisdiction over telephone companies. 84-816 Pet. 4-11; 84-856 Pet. 14-16. The cases cited by Wisconsin and New York involve issues entirely distinct from the issues presented by the *Access Decision*. Those cases concern: (1) the preemptive effect of FCC depreciation policies and rates applicable to telephone plant equipment that is used indivisibly for intrastate and interstate service (*e.g.*, *Virginia State Corp. Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), appeal and petition for cert. pending, Nos. 84-871, 84-889); and (2) whether an FCC preemption order arising from rulemaking proceedings is enforceable in district court (*e.g.*, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 74. F.2d 1 (1st Cir. 1984), petition for cert. pending, No 84-900; *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), appeal pending, No 84-870). Nor is there merit to petitioners' contention that this Court should consider the impact of the divestiture decree in *United States* v. *AT & T*, 552 F. Supp. 131 (D.D.C.), aff'd, 460 U.S. 1001 (1983), on "the correct apportionment of regulatory jurisdiction between federal and state authorities." 84-816 Pet. 5, 12-13; 84-856 Pet. 7. It plainly is not the role of the courts to undertake to revise or reconsider allocations of regulatory jurisdiction so as to accommodate the divestiture. If there is a need to consider the "impact" of the divestiture on the apportionment of regulatory jurisdiction, Congress is the appropriate body to perform that task. See 84-95 Gov't Br. in Opp. 12-13 & n.5. The only question properly

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nation that Centrex-CO lines generate costs comparable to other subscriber lines, and that the FCC had taken reasonable measures to soften the impact of the new charges on Centrex-CO users (*ibid.*).

before this Court on these petitions is the lawfulness of the FCC's end-user access charges, and that question does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985